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**WHAT ARE THE LAWS OF WAR? LEGALITY OF THE THREAT  
OR USE OF NUCLEAR WEAPONS**  
**SAVAŐ KANUNLARI NELERDİR? NÜKLER SİLAHLARIN TEHDİT VEYA KULLANIM  
YASALLIĐI**

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**ABSTRACT**

Along with the incremental concerns as to human rights in general and the right to life of the civilians in war times, the vitality of taking necessary actions to save whole planet and the livings in it from the catastrophic environment caused by nuclear weapons use is, at last, getting understood. The origin of this study goes back to the question "Is the threat or the use of nuclear weapon legal" directed by UN General Assembly to International Court of Justice (ICJ) From this point, in this study is analyzed the legality of the threat and use of the nuclear weapons by searching through oral and written statements of the participant states and points of view of the member of the International Court of Justice. In conclusion, although ICJ declined to leave a comment concerning the question due to the ambiguity, ICJ accepted that the threat or use of nuclear weapons is actually contrary to the rules of international law, armed conflict principles, and principles and rules of international humanitarian law.

**Keywords:** International Court of Justice, International Humanitarian Law, Armed conflict, Biologic, Chemical, Nuclear weapons

**ÖZ**

Genel olarak insan haklarına ve savaő zamanında sivillerin yaőam haklarına verilen artan önemle birlikte, bütün dünyayı ve içindeki tüm canlıları nüklür silah kullanımının yol açtıĐı felaket ortamından kurtarmanın önemi sonunda anlaőılıyor. Bu çalışmanın çıkıő noktası Birleőmiő Milletler Genel Kurulu tarafından Uluslararası Adalet Divanı'na yönlendirilen "Nüklür silah tehdidi ya da kullanımı yasal mıdır?" sorusuna gitmektedir. Bu açıdan, bu çalışmada katılımcı devletelerin sözlü ve yazılı ifadeleri ile Uluslararası Adalet Divanı üyelerinin görüşlerinin araştırılması yoluyla nüklür silah tehdidi ya da kullanımının yasallığı analiz edilmiştir. Sonuçta, Uluslararası Adalet Divanı belirsilikten dolayı yorum yapmayı kabul etmemesine raĐmen, nüklür silah tehdidi ya da kullanımının aslında uluslararası hukuka, silahlı çatıőma prensiplerine ve uluslararası insan hakları yasasının prensip ve kurallarına aykırı olduĐunu kabul etmiştir.

**Anahtar Kelimeler:** Uluslararası Adalet Divanı, Uluslararası İnsan Hakları, Silahlı çatıőma, Biyolojik, Kimyasal, Nüklür silahlar

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## **INTRODUCTION**

Along with the care and significance given to the sanctity of life and desire to make regulations and to put some basic rules and principles in war, there are some international organizations exerting best efforts world-wide to ensure that humane ways still prevail as much as possible even in the war times.

While technological possibilities enhanced, countries became more prone to aggression and so-called civilized world turned to be more deadly for the ones who are less powerful than others. In wars, along with the casualties from military side, innocent civilians die, too. No matter how much a war looked reasonable at the first sight, it brings nothing but destruction to not only adversary countries, but also to the neighbor countries. We, with regret, got stuck in a world where a country can wage war against another by absent proper justification if a powerful country believes it has a political or economical benefit over another. Within such a world order, there must be an authority(ies) who safeguards the helpless, backs up the defender and puts the aggressor on the right track. Some of the international organizations who carry out this lofty mission are namely International Committee of the Red Cross (ICRC), International Court of Justice (ICJ), United Nations (UN) so on so forth. All these organizations' main purpose is to protect civilian lives, ease their pain and provide a peaceful and better future for them.

In this context, the main purpose of this study is to create a certain level of awareness by analyzing the legality of the threat and use of nuclear weapons and also to contribute to literature by a holistic approach supported by the points of view of the states through their both oral and written statements and also points of view of the members of the International Court of Justice in relation to the question posed to ICJ concerning the legality of the threat or use of nuclear weapons.

## **THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW**

UN suggests in the preamble of the universal declaration of human rights that human dignity and rights should be protected from the barbarity, tyranny and oppression. Also, the sustainability friendly environment among the nations should be promoted and rule 3 suggests that "*Everyone has the right to life, liberty and security of person.*" According to international humanitarian law, which is a set of rules that intend to protect civilian lives in an armed conflict, persons who no longer take a part in hostilities or means of warfare must be protected by law and the main functionality of it is to make sure that inhumane treatments and unlawful means of war are prevented. In comparison to universal declaration of human right, international humanitarian law aims to bring a livable environment for human being during war times. Both of them strives to achieve the provision of sustainable life standards for humanity in both peace and war times.

## **THE SIGNIFICANCE OF THE INTERNATIONAL HUMANITARIAN LAW**

As well as it is known, war brings destruction, chaos and catastrophe, and who suffers the most is the people in the conflicted areas, therefore, international humanitarian law exerts its best effort to provide better life prospects for the people living in the conflicted areas. In the war times, controlling military force of a state and sometimes even the states themselves might be a hard labor to do, for states that are in war are, in many cases, inclined to committing war crimes due to the psychology and negative conditions of war. Nevertheless, international humanitarian law, in this aspect, tries to set a delicate balance between the military requirements and humanitarian concerns. This is the reason why international humanitarian law is called as law of war or law of armed conflicts. International humanitarian law is mainly based upon four Geneva Convention of 1949 and

Additional Protocols of 1977. Internal tensions and disturbances are not the concern of international humanitarian law until it arrives to and armed conflict between states. It is significant to make a distinction between human rights law and international humanitarian law. If there is a domestic conflict taking place in a single state like a conflict between the military force of a state and armed groups in that state, the means and methods of war is the concern of human rights law. However, if there is a war between two states, it is the concern of international humanitarian law.

#### **THE DEFINITION AND DISTINCTION BETWEEN INTERNATIONAL CONVENTIONAL AND CUSTOMARY LAWS**

An international law can be classified under only two groups as follows:

**Conventional international law, or treaty law**, is based on international agreements, conventions and treaties: it is binding only on ratifying nations. Conventional Law is governed by the Vienna Convention on the Law of Treaties.

**Customary international law** is a kind of international common law based on widespread state practice and acknowledgment of obligation; on the judgments of domestic and international tribunals; and on "the general principles of law recognized by civilized nations" and "the teachings of the most highly qualified publicists of the various nations." It is binding on all nations and on non-state actors." (International Court of Justice, article 38)

In a nutshell, it can be said that conventional international law is a written law approved by the participant states, which is only binding for those participant states that signed on the treaty. However, when it comes to customary international law, it is formed through the long practice of both the states and international organizations. Therefore, if a conventional international law turns, over time, to a customary international law, it then becomes widely accepted and binding for all states. What is necessary here to point out is that states sometimes become reluctant to make treaty laws due to the possibility that they might lose their advantageous position because in some cases, the treaties signed might tie states' hands in taking measures which happen to be against law. Considering on the possibility of such times, they simply tend to make omissions when it comes to signing these treaties which are expected to bring relief and peace to the world. It is simple to say that customary international law, therefore, is more generalizable to all the states during international armed conflicts. The vitality of customary law may be comprehended when the gravity is given to the thought that international armed conflicts may go unsolved because of juristical incompetence.

Although the significance to come to a fair solution for international armed conflicts is obvious, states may be uneager to ratify the treaties to gain exemption from the application of the law on them if a war crime takes place in an international war. This is why the states decline to sign such international treaties. To exemplify, although four Geneva conventions of 1949 were almost universally signed, it cannot be said the same for Additional Protocols, which have been ratified by more or less 160 states and the ones that have not ratified comprise of the states where there are non-international armed conflicts existing. This very example clearly illustrates the significance of the existence of customary international laws. Today, where there is a non-international armed conflict is widely applied four Geneva conventions' article 3, owing to the states' few number of ratifications of Additional Protocols, which impedes the applicability and generalizability of the treaty on every state.

#### **PRINCIPLES OF DISTINCTION, PROPORTIONALITY AND UNNECESSARY SUFFERING**

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As the rules of law, there are binding and significant principles that mean to protect human life and to lower the destructive effects of war.

Giving reference to principle of distinction, rule 1 of Customary IHL suggests that "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." (Additional Protocol I, 1977)

As it is clearly stated, civilians cannot be targeted in an attack, and the term civilian is defined, according to Rule 5 of Customary IHL, as "*Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.*" (Article 50 of the 1977 Additional Protocol I), while the term combatant is defined, according to Rule 3 of Customary IHL, as "*All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.*" (Article 43(2) of the 1977 Additional Protocol I). The first principle mentioned clearly shows that during an international armed conflict, no state is permitted to aim at or hit civilian targets, so only legitimate target is the combatants. The military forces should be discreet to distinguish civilian objects from combatants

According to rule 12 of customary IHL, "*Indiscriminate attacks are those:*

*(a) which are not directed at a specific military objective;*

*(b) which employ a method or means of combat which cannot be directed at a specific military objective; or*

*(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.*" (Article 51(4) of the 1977 Additional Protocol I)

According to definition of military objectives based on rule 8 of customary IHL, "In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." (Article 52(2) of the 1977 Additional Protocol I), while definition of civilian objects based on Rule 9 of customary IHL is "Civilian objects are all objects that are not military objectives." (Article 52(1) of the 1977 Additional Protocol I)

Giving reference to the principle of proportionality, rule 14 of customary IHL states that " Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited." (Article 51(5),(b) of the 1977 Additional Protocol I)

Third principle to be mentioned is superfluous injury or unnecessary suffering. Rule 70 of customary IHL states that "The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited." (Additional Protocol I). In accordance with this principle, the result of a military attack should not lead to unnecessary suffering to the targets of the military attack.

### **THE CHEMICAL, BIOLOGICAL AND CONVENTIONAL WEAPONS: UNDER WHICH CATEGORY SHOULD NUCLEAR WEAPON BE CLASSIFIED?**

Before the work goes any further, weapons should be classified under categories depending on characteristics and the ones prohibited by law should be determined and emphasized.

Rule 71 and 72 of customary IHL sequentially state that "The use of weapons which are by nature indiscriminate is prohibited."; "The use of poison or poisoned weapons is prohibited." (1980 Convention on Certain Conventional Weapons; Article 23(a) of the Hague Regulations) As the rules clearly state, indiscriminate and poisonous weapons are not allowed to be used in wars. According to ICR advisory opinion in Nuclear weapon case, poisoned weapons are defined as the ones whose prime, or even exclusive effect is asphyxiate; however, USA and UK in their statements, on the other hand, referred to the poisoned weapons as designed to kill or injure through poison. Therefore, from this statement is inferred that there must be intended injury.

### **1. Biological Weapons**

Rule 73 of customary IHL states concerning biological weapons that "*The use of biological weapons is prohibited.*"

Biological weapons are designed as:

"1- *Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;*

2- *Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.*" (Biological weapons convention, 1972)

Biological weapons are easy and cheap to produce, as they are not high technology products. In a lab, it can be easily produced in big quantities in a short period of time. Also, they are effective weapons when it comes to killing large numbers of people in wars, yet possession and the use of them were held forbidden by the international law because they are considered as a mass destruction weapons.

### **2. Chemical Weapons**

Rule 74 of customary IHL states concerning chemical weapons that "*The use of chemical weapons is prohibited.*"

-According to the Chemical Weapons Convention (1993), chemical weapons are defined as follows:

"(a) *Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;*

(b) *Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;*

(c) *Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b). "*

-*"Toxic Chemical"* is defined as following:

*"Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere."*

Chemical weapons, likewise biological weapons, are weapons of mass destruction, which fail to meet three important criteria mentioned (Distinction, proportionality and unnecessary suffering) and are cheap either to obtain or to produce. This is why by the compliance of the international law, they are also deemed as illegal.

### **3. Herbicides**

Rule 76 of customary IHL states regarding herbicides that the use of herbicides as a method of warfare is prohibited if they:

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- "a) are of a nature to be prohibited chemical weapons;  
b) are of a nature to be prohibited biological weapons;  
c) are aimed at vegetation that is not a military objective;  
d) would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated;  
or  
e) would cause widespread, long-term and severe damage to the natural environment."

There was an unresolved debate about herbicides whether they were forbidden by Geneva Gas Protocol before the Chemical Weapons Convention took place. However, after the legalization of Chemical Weapons Convention, now it is illegal to destruct vegetations, in vain. Once a nuclear weapon, or a chemical weapon, or a biological weapon is launched, because of its indiscriminate nature, along with the humans (especially civilians), animals, the balance of the nature and vegetations, which are food supply for both humans and animals, also get damaged.

#### **4. Conventional weapons**

Convention on Certain Conventional Weapons (CCW) (1980) declares that it is prohibited by the international humanitarian law that some types of conventional weapons should not be used in war due to their indiscriminate, disproportionate and superfluous injurious nature, which do not serve the core values and purposes of the military anticipations. Therefore, it can be said that conventional weapons are the weapons that are commonly used and are not weapons of mass destruction. After a certain period of time, some of the weapons have been prohibited by customary international law such as poison or poisoned weapons; biological weapons; chemical weapon; herbicides; expanding bullets in human body or the bullets which explode within the human body; the weapons whose the primary effect is to injure by fragments which are not detectable by X-rays in the human body (Protocol I); landmines and booby-traps (Protocol II). What is appreciable in CCW is the fact that with the changing needs and expectations of civilized societies, new Protocols can be added to make a better world.

#### **5. Nuclear Weapons**

The question "*Is the threat or use of nuclear weapons in any circumstance permitted under international law?*" was raised by UN General Assembly to ICJ for an advisory opinion. The states who wanted to have a say regarding this question submit their both written and oral statements before the court. The court gave its advisory opinion about the case, which will be mentioned in the following parts of the work.

According to UN report (1980), the characteristics and the destructive effects of a nuclear weapon are "*shock waves or air blasts; thermic waves or radiation; fires; initial nuclear radiation; residual nuclear radiation or radioactive fallout; and - electro-magnetic impulses (heat, blast and radiation, in short).*"

The classification of nuclear weapons has not been properly made using scientific methods; instead, rhetorical, imaginative and exaggerated statements about the classification of nuclear weapons were put forth by not scientists but by politicians. There are assertions and rigorous debates brought about by especially UK and USA in their statements. New generation nuclear weapons were presented as less unacceptable through new generation of nuclear weapons with made-up names like tactical bombs, nukes and clean-bombs, which still contain radiation, a type of poison which was prohibited by customary IHL laws and the conventions on poison and poisoned weapons, although production, technology improvement, possession and testing were subject to some strict restrictions under universal conventions namely International Atomic Energy Agency (1957 ); Antarctic

Treaty (1959); Partial Test Ban Treaty (1963); Outer Space Treaty (1967), Nuclear Non-Proliferation Treaty (1968); Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof (1971).

Whole world witnessed the catastrophe happened in Hiroshima and Nagasaki due to nuclear missile launched. ICJ (1995) states that at the peak period of Cold War, there were approximately 80.000 warheads existing, which were capable of exterminating the whole world several times. Now, there are more than 40.000 nuclear warheads existing with a destructive capacity of almost a million times greater than the nuclear missiles that hit Hiroshima. Over time, the delivery systems and nuclear arsenal capacity have been rapidly enhanced and are no longer primitive as it used to be in the past. Given the gravity to the situation, it is needless to say that nuclear weapons pose a great danger for the survival and sustainable peace environment of the humanity.

The valid question is what kind of future prospects are we going to hand down to the next generations, a future with full of terror and misery, or great expectations?

### **WAR CRIMES**

According to the Geneva Convention, the acts deemed as a war crime are listed below:

- *willful killing*<sup>2</sup>;
- *torture or inhuman treatment, including biological experiments*;
- *willfully causing great suffering or serious injury to body or health*;
- *extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*;
- *compelling a prisoner of war or other protected person to serve in the forces of a hostile Power*;
- *willfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial*;
- *unlawful deportation or transfer*;
- *unlawful confinement*;
- *taking of hostages*.

Although weapons of mass destruction, like biological and chemical weapons, were prohibited under the conventions and treaties namely The Biological and Toxin Weapons convention (1972); Environmental Modification Treaty (1977); the United Nations Conventional Weapons Convention and its Protocols (1980), and the Chemical Weapons Convention (1993); and customary IHL law for Poison and Poisoned Weapons based mainly on the Article 23(a) of the Hague Regulations (1899 and 1907), use of nuclear weapon as another means of mass destruction weapon has somehow not been prohibited yet; instead, negotiations on disarmament took place (NPT). Moreover, International Atomic Energy Agency supported nuclear energy for peaceful purposes and in compliance with NPT, thousands of nuclear warheads dismantled and used for production of nuclear energy.

### **COMMON POINTS IN THE WRITTEN AND ORAL STATEMENTS OF UK AND USA, AND COUNTER OPINION OF SOLOMON ISLAND; AND THE STANCE OF OTHER COUNTRIES REGARDING THE THREAT AND USE OF NUCLEAR WEAPONS**

More or less the similar emphases made by both UK and USA, which are considered significant, are as follows:

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<sup>2</sup> The items with the sign "\*" will be discussed further in the "Discussion" section.

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- No convention or treaty implicitly banning the threat or use of nuclear weapon exists,

- In the extreme cases like survival of the state, nuclear weapons can be used as defending the state owing to the significance of self-defense and survival of a state,

- The effect of a nuclear weapon can be, thanks to its delivery and specific targeting systems, tailored in accordance with the size of main target and its surroundings, and used as a tactical weapon.

- While the use of weapons of mass destructions such as Biological and Chemical weapons were strictly and explicitly prohibited, the threat and use of nuclear weapon have not been prohibited.

Solomon Island in its statement finds both the threat and use of nuclear weapons unlawful because threat is an aggressive behavior and provokes another. Put aside a direct threat or use, according to Solomon Island, debates about whether or not to use nuclear weapons for self-defense are against the spirit of Non-Proliferation Treaty. That would be a counter effort which impedes the success of the applicability of non-proliferation. However, prohibition of the threat and use of nuclear weapon is significant because the long and short terms and immediate effects of radiation derived from the explosion of a nuclear bomb regardless of tactical or strategic bomb shall be traced in the future generations' genetic disorders and deficiencies if short term or immediate deaths do not come by nuclear weapons' radioactive substances or heat.

Australia states that nothing remains the same, so what was right in the past does not necessarily have to be right now, which opens a door to revise the legality of the threat or use of nuclear weapon. Things change, along with it, laws may change over time, as well. What was accepted in the warfare in the past as means and methods may change, too. Biological and Chemical weapons' prohibitions are good example of the possibility of the prohibition of nuclear weapons in the future.

According to Romania, nuclear, bacteriological, chemical, biological weapons as well as all weapons of mass destruction together must be prohibited. "Dumdum bullet" and other weapons that are not regarded as conventional weapons were prohibited because they inherently give superfluous injury and damage the bodily integrity, nuclear weapons with the well-known health hazards against humans derived from the radiation release should, in this way of reasoning, be banned, too.

#### **ADVISORY OPINION OF INTERNATIONAL COURT OF JUSTICE AND ITS MEMBERS ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS**

The question put by the General Assembly were answered as follows:

*A. Unanimously,*

*There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;*

*B. By eleven votes to three,*

*There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;*

*IN FAVOUR* President Bedjaoui; Vice-President Schwebel; Judges Oda,

*Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin,*

*Ferrari Bravo, Higgins;*

*AGAINST* Judges Shahabuddeen, Weeramantry, Koroma;

*C. Unanimously,*

*A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful ;*

*D. Unanimously,*



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*A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons ;*

*E. By seven votes to seven, by the President's casting vote,*

*It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; however, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake;*

*IN FAVOUR: President Bedjaoui; Judges Ranjeva, Herczegh, Shi, Fleischhauer,*

*Vereshchetin, Ferrari Bravo;*

*AGAINST : Vice-President Schwebel ; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins;*

### **1. Declaration of President Bedjaoui**

He pointed out that the court, since they did not have enough evidence and sources to have insight into the matter, avoided making an interpretation and giving a clear answer regarding the threat and use of nuclear weapons in extreme cases like survival of the state and self-defense. He also emphasized that just because the court decline to give a crystal clear answer, it does not mean that the court meant to leave an open door to neither the threat or the use of nuclear weapon. However, if it comes to there, he clarified that survival of the humanity is more important than the survival of the state.

### **2. Declaration of Judge Shi**

He argues that nuclear weapon states, when it comes to making decisions about the threat and use of nuclear weapon, manipulate other states and set alliance with the other nuclear states to keep their deterrence by their material power. He also gives reference to the fact that they really do not have good faith during the negotiations.

### **3. Declaration of Judge Vereshchetin**

He also states that the court is not to be blamed because they could not go any further due to the ambiguity and lack of data.

### **4. Declaration of Judge Ferrari Bravo**

He calls nuclear weapons as unlawful and he believes that Cold War decelerated the speed of prohibiting the nuclear weapons. He thinks threat or use of it is unlawful and over time odds will change and prohibition will be ensured because the structure of customary international law is flourishing, and customary law may one day prohibit the nuclear weapon use.

### **5. Separate opinion of Judge Guillaume**

In the extreme cases like the survival of a state, he recognizes the legality of the use of nuclear weapon because if the collateral damage upon civilians is not bigger than the anticipated military advantage, which he prefers to accept as an extreme case, threat and use of nuclear weapons should be allowed. He states that if the law is silent, states can act the way they think it fits.

### **6. Separate opinion of Judge Ranjeva**

He claims that the court is the first in emphasizing the use or the threat of use of nuclear weapons is against the rules of international law, armed conflict principles, and principles and rules of humanitarian law. He believes that advisory opinion regarding either threat or use of nuclear weapon cannot be justified.

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### **7. Separate opinion of Judge Fleischhauer**

He emphasizes that humanitarian law and international law applicable in armed conflicts contradict with each other. Survival of state argument sounds fair in terms of international law applicable in armed conflicts, yet international humanitarian law is more protective and strict when it comes to the use of nuclear weapon. He thinks debates upon the use of nuclear weapon have been not only held superficial and narrow but also lacked goodwill. He, therefore, suggests to the states that they should make their moves in good faith, since the court could not have a crystal-clear say about the matter.

### **8. Dissenting opinion of Judge Oda Judge**

He claims that General Assembly asked the advisory opinion from the court, yet the context of the question is not properly drafted and is not crystal clear in terms of the lack of consensus upon the statements of General Assembly because the General Assembly itself failed to arrive at a common ground with respect to a convention on the prohibition of the threat and the use of nuclear weapons. He states that court should not have given an advisory opinion, as the solution of this very problem is far from the concern of the judicial mechanism, so the right platform where this problem should have been raised and discussed would be a conference on disarmament or UN because it is more political issue than judicial. This is the reason why he voted against subparagraph E

### **9. Dissenting opinion of Judge Weeramantry**

He considered the efforts and moves of the court as valuable because the advisory opinion of the court would be a guidance in the uncertainty with which the General Assembly faced and a part of solution through its significance and prompting nature. He clearly stated that the threat or use of nuclear weapons is, under any condition, illegal, which stands as a violation of the fundamental principles of both the international law and humanitarian law due to the threat that it poses to the very survival of both humanity and entire planet.

### **10. Dissenting opinion of Judge Koroma**

He finds the threat or the use of nuclear weapons as a violation of the law and claims that Court regarded the question of the General Assembly as competent at the first place, the opinion, therefore, should have been given to General Assembly based on the international law. He continues and argues that threat or the use of nuclear weapons is against particularly the principles and rules of humanitarian law and the rules of international law applicable in armed conflicts, in general. Under the light of this information, the Court should have come to the conclusion that the threat or use of nuclear weapons is unlawful. According to him, by not making this statement, Court could not make any contribution to the matter, but brought greater uncertainty into it, instead.

## **DISCUSSION**

According to principle of distinction (rule 1 of Customary IHL), "The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." (Additional Protocol I, 1977). So far, it has been clearly defined what distinction and indiscriminate attacks; civilians and combatants; military objectives and civilian objects are, and any means of war in international armed conflicts should distinct civilian objects from military targets. Given the gravity to the spirit of the ICRC (International Committee of the Red Cross) and IHL, as they assert, the sanctity of human life is meant to be preserved. However, the following principle gives way to the legitimate slaughter of humans.

Giving reference to principle of proportionality, rule 14 of customary IHL states that " Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination

thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited." (Article 51(5)(b) of the 1977 Additional Protocol I)

The word excessive cannot be measured due to the ambiguity the word has in itself. Once the word excessive or the synonyms of the word excessive are used when it comes to legalizing killing the civilian objects for the sake of an unknown probability of any kind of military achievement expectations, the lofty values and stance of ICRC and IHL lose swiftly its meaning. A war, needless to say, without exception, ends up the deaths of thousands of even millions of people including civilians, yet regardless of the expected and predictable consequences of war, even the most primitive so-called humane law cannot, in any way, legalize the murder of civilians for any victory gain or tainted ambitions. However, the principle of proportionality leads to the legitimate murder of civilians. Hence, for the good of humanity, the principle of proportionality should immediately be abolished because there is no cause, ideal or reason that can legitimize the slaughter of innocent human-beings who take no part in the war. The principle of proportionality does not belong to this century. Of all the states, no matter what, must be held accountable if any civilian is by mistake or on purpose killed in an attack. Once a law opens a door through killing civilians with ambiguous terms and unclear statements continuing with "...*excessive in relation to...*" or derivatives of it, as mentioned before, the interpretation might likely change from one state to another relying on how aggressive and bully, or wise and respectful towards sanctity of human life.

Third principle to be mentioned is superfluous injury or unnecessary suffering. Rule 70 of customary IHL states that "The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited." (Additional Protocol I)

According to the this principle, it can be said that in an attack, opponent soldiers should not be hurt more than what is necessary. What is necessary is, according to many, the extent to which the opponent soldier loses his ability to fight any more in the ongoing battle. However, losing his ability to fight does not mean making the soldier cripple or lose a part of his body. What is only meant by this principle is to discard the soldiers temporarily. Nevertheless, this principle is also open to malicious interpretations, as well. A state with dirty ambitions who has a great power in the international area may go further in the interpretation, which may arrive out of the boundary of common sense, and the state may even infer that as long as a soldier does not suffer unnecessarily, implying on direct and quick death, each and every method is lawfully allowed to be used by the courtesy of the principle of proportionality.

The lines of which were emphasized with stars in the "War crime" section that illustrate nuclear weapon use are, with evidence, war crimes. Use of nuclear weapon is an act of

- *willful killing* because before launching the missile, it is already known that the attack will indiscriminately kill large numbers of civilians,

- *torture or inhuman treatment, including biological experiments* because of the scientific curiosity and convenience to reach many test subjects inflicted by the radiation,

- *willfully causing great suffering or serious injury to body or health* because such consequences of a mass destruction weapon with extensive amount of heat and poisonous radiation release, which leads to slow, painful and certain death, are expected outcomes,

- *extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly* because aggressor does not hesitate to launch the attack, although he is very well aware and informed of the

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future consequences of the use of nuclear weapon, which absolutely will result in the death and unnecessary suffering of extensive amount of civilian. No cause is greater than the sanctity of a human (especially civilian) life, who prefers to stay out of that conflict that two forces fight with each other,

- *unlawful deportation or transfer* because after the detonation of a nuclear bomb, no living thing (humans, animals and plants) can survive in the area that remains in the range of the radiation particles' fallout, which should immediately be evacuated. If the attack were not launched in the first place, there would be no need for that of evacuation,

- *unlawful confinement* because people whose body is contaminated with radiation after the explosion of nuclear missile, should be isolated from others in order to make sure others do not get transmitted that of highly poisonous radiation by the inflicted people. If in the first place were not there any nuclear attacks, there would not be any need for confinement, which gives insights to the reason why nuclear weapon use leads to unlawful act.

Partial Test Ban Treaty (1963) forbids, in its Preamble, the test of nuclear weapon in the atmosphere, in outer space and under water and Nuclear Non-Proliferation Treaty (1968) is against developing the nuclear technology ( "*United States will not conduct nuclear explosive tests, develop new nuclear weapons, or pursue new military missions or capabilities for nuclear weapons*"), yet over time, the delivery systems and nuclear arsenal capacity somehow have been rapidly enhanced and are no longer primitive as it used to be in the past. However, nuclear weapon states argue that new generation nuclear weapons called tactical bombs, nukes, and clean-bombs have precise targeting. If what is meant by using nuclear weapon is as no more than (as the nuclear weapon states prefer to refer) a tactical weapon with a limited range of effect, then there is no longer need for a nuclear weapon at all, for conventional weapons also serve for the same purpose as effectively as a nuclear weapon can do without causing any damage to the humans, animals and nature.

The actual reason why a state uses nuclear weapons is because of the fact that the state means to change the balance of the scale in war through the supremacy and effect range of a nuclear weapon. Moreover, once a state uses a nuclear weapon, even with a limited power of explosion, there still remains a great deal of possibility to bear that inflicted country might attack back with a nuclear weapon of a higher effect power, so on so forth. Exponentially, this might lead to the nuclear conflagration to the extent that all humanity may be annihilated. About this, directly opposite ideas have been put forward. It has been said that the likelihood of a nuclear conflagration is so small that there is no need to take into account because the evident indicates that during especially cold war, states acted as rational actors. Hence, no party waged war against each other, since it was known for them that if it had been for a war, nuclear missiles might have been used as a thorough and rigorous means and methods of warfare and it would have brought a complete end to the both parties. This idea, according to some, prevails, but just because states, at that very case, acted reasonably and rationally once, does it not mean next time the same rational and reasonable act would be posed? Even a tiny probability of a nuclear conflagration is more than enough to eliminate all the nuclear weapons in the world, for what is at risk is the survival or annihilation of whole humanity.

Leaders, especially in the times of war, are inclined to lose their sense, rationale and control while taking decisions which might change the course of the war upside down. For instance, Hitler never hesitated a minute while sending more troops composed of the kids, olds and women even though there was no hope to win the war. Could anyone say that a leader like Hitler would listen his reason and in order not to cause a nuclear conflagration, we would decline to send his nuclear

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weapons, if he had, for the good of humanity? Therefore, as long as the nuclear weapons exist, humanity will keep living on the brink of the total extermination of the planet and his survival.

According to the Article VI of the Nuclear Non-Proliferation Treaty, "*Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.*" Moreover, the main goal of the Nuclear Non-Proliferation Treaty (1968) is, so-called, complete elimination of the nuclear weapons. Firstly, the name of the treaty is non-proliferation, not the prohibition and as the name implies, parties to the treaty who hold nuclear weapon do not actually mean complete elimination of nuclear wars conversely to the statement made about "pursuing negotiations in good faith" and "complete disarmament". Today is 2015 and the treaty was signed in 1968, so although almost half a century passed, the distance taken is not even close to be enough, which proves there is no good faith as it is stated in the treaty.

### CONCLUSION

In a nutshell, it can be said that the characteristics of the nuclear weapons do not meet three significant principles namely distinction, proportionality and unnecessary suffering. Heat, massive blast, and radiation release whether primary or secondary, which come along with the detonation of the nuclear bomb, are contrary to customary IHL for Poison and Poisoned Weapons based mainly on the Article 23(a) of the Hague Regulations (1899 and 1907); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; The Biological and Toxin Weapons convention (1972); Environmental Modification Treaty (1977); the United Nations Conventional Weapons Convention and its Protocols (1980); and the Chemical Weapons Convention (1993).

Given the gravity to the assertions made on statements submitted to the Court to get the advisory opinion, the existence of a small probability of nuclear conflagration was accepted. That small probability of nuclear conflagration renders extremely great considering that the survival of the humanity and entire planet is threatened by it. What is the meaning and necessity of the debate whether or not the threat or use of nuclear weapon is lawful next to the risk of the annihilation of the whole planet and the livings in it?

According to the advisory opinion of International Court of Justice on the legality of the threat or use of nuclear weapons, there is no treaty that actually bans the threat or use of nuclear weapons, yet it is explicitly stated that the threat or use of nuclear weapons is contrary to both international law applicable in armed conflicts and international humanitarian law. However, the court, when it comes to the extreme cases like self-defense and the survival of a state, declines to state an advisory opinion.

It is obvious that there is an ongoing debate regarding the legality of nuclear weapons continuing for more than half a century, yet there is still almost no improvement at all other than the promises for improvement about disarmament of and restrictions on nuclear weapons because nuclear weapon states simply do not want to lose their privilege of being a deterrent power through supremacy gained via having nuclear weapons. This is why they manipulate international laws, rules and principles and impede the process of nuclear disarmament. Moreover, through the treaties and conventions which are held in the absence of good faith, they achieve keeping their nuclear weapons with the promises of disarmament in an unknown future, while convincing the non-nuclear weapon states not to obtain nuclear weapon technology. In this context, the advisory opinion of the Court,

which actually should have been contrary to the threat or use of nuclear weapons under every conditions, was a matter of life and death for the future of the complete nuclear weapon prohibition. The Court, afterwards, should have also called for an immediate convention for the prohibition treaty on threat or use of nuclear weapons.

Moreover, that there is no law, treaty or convention banning the threat or use of nuclear weapons does not substantially mean it is normal and right to keep or use them; on the very contrary, it only means that there is a crack in the system of international law. Therefore, necessary steps and measures must be taken as soon as possible to fill this gap so that the international peace and security can be brought and sustained because what was considered right back in the time might no longer right in today's world. This is why such a reasoning like "There is no law, treaty or convention prohibiting the threat or use of the nuclear weapons, so nuclear weapons can be lawfully used if necessary." is a facile argument. For instance, slavery was once allowed under the law, yet now stands as one of the dirtiest stains on humanity. As the judge Koroma, Shi and Weerantanti mentioned, Court's advisory opinion on prohibition of the threat or use of nuclear weapons was of great significance . Hence, as an initial step forth the prohibition of the threat and use of nuclear weapons, the Court should have managed to show the courage and willpower to condemn and to explicitly prohibit both threat and the use of nuclear weapons for the cost of offending big powers.

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